

Application Serial No. 10/522,322
Reply to Office Action of February 23, 2009

PATENT
Docket: CU-4060

REMARKS

In the Office Action, dated February 23, 2009, the Examiner states that Claims 33-63 are pending, Claim 63 is objected to, and Claims 33-63 are rejected. By the present Amendment, Applicant amends Claims 39, 40 and 63.

Rejections under 35 U.S.C. 112

Claims 33-63 are rejected under 35 U.S.C. 112, second paragraph, for the reasons of record. Specifically, the Office Action does not consider it clear whether the extract of combination of herbs differs from the "mixture of herb extracts." Applicant respectfully disagrees with and traverses these rejections.

The expression "an extract of a mixture of herbs" appearing, for example, in Claim 33 means that the four herbs, peppermint, sage, yarrow and thyme, are mixed and this mixture is extracted. The expression "a mixture of herb extracts" appearing, for example, in Claim 34, means that each of the four herbs, peppermint, sage, yarrow and thyme, is extracted separately and that the four extracts thus obtained are then mixed. It would, for example, also be possible to extract a mixture of peppermint and sage on the one hand and a mixture of yarrow and thyme on the other hand and then to combine the two extracts thus obtained; or to extract, for example, each of peppermint, and sage separately on the one hand and a mixture of yarrow and thyme on the other hand and then to combine the three extracts thus obtained; etc.

It should be appreciated that the result of the various modes of operation outlined above is always the same, thus the terms "an extract of a mixture of herbs" and "a mixture of herb extracts" may indeed be deemed being, in some way or other, equivalent. Applicant trusts that the foregoing explanations will clarify what, in the Office Action's view, is unclear.

With respect to Claims 45 and 46, Applicant indicates that Claims 39 and 40 are currently amended to be dependent from Claims 33 and 34, respectively.

In view of the foregoing, Applicant respectfully requests withdrawal of the present rejections under 35 U.S.C. §112.

Rejections under 35 U.S.C. §103(a)

Claims 33-52 and 57-60 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kirschner et al. (US 6,352,713) in view of Zhou (US

Application Serial No. 10/522,322
Reply to Office Action of February 23, 2009

PATENT
Docket: CU-4060

2002/0132037). Claims 53-56 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kirschner et al. and Zhou in view of Bell et al. (US 5,338,809). Claims 61-63 are rejected under 35 U.S.C. §103(a) as being unpatentable over Oppenheimer et al. (US 4,980,169) in view of Kirschner et al. and Zhou. Applicant respectfully disagrees with and traverses these rejections.

Applicant respectfully asserts that Kirschner teaches chewable prenatal nutrition supplements containing vitamin C and, optionally, folic acid, minerals, other vitamins and/or additives, these supplements being substantially non-acidic (calcium carbonate, see Examples I-IV) and, therefore, providing vitamin C in adequate levels for pregnant women while minimizing or eliminating gastric upset, dyspepsia and/or tooth enamel erosion (see "field of the invention" in Column 1). Kirchner's product may also include, inter alia, herbal derivatives, plant derivatives, photo-chemical derivatives or combinations thereof, the list of herbals and herbal derivative being extensive and indeed include, among very many others, peppermint, sage, thyme and yarrow. Kirchner's product may, in addition, also include "various additives", inter alia, sweetening agents such as water-soluble sweetening agents, water-soluble artificial sweeteners, and dipeptide-based sweeteners, preferably glycyrrizin or salts thereof. Applicant asserts that Kirschner et al. is silent with respect to "an extract of *Stevia rebaudiana*" as a sweetener but Zhou, cited as an ancillary reference, may teach such extract as a sweetener.

Zhou teaches a herbal sweetener composition which is low in calories and ideal for use as a substitute for refined sugar or sucrose (0001), that composition comprising a naturally occurring sugar selected from glucose, fructose, maltose and mixtures thereof and a terpene glycoside (0011), said terpene glycoside including extracts from various edible botanicals or herbs, inter alia, *Stevia rebaudiana*. In Zhou's products the ratio between naturally occurring sugars and terpene glycoside is ideally about 25:1 (0017), thus Zhou's product contains, as its main components, naturally occurring sugars.

As mentioned above, Kirchner's product comprises, as its main ingredients, vitamins C and calcium carbonate, and the herbals and herbal derivatives which it may also contain, as additives, in addition to folic acid and other vitamins, cannot be deemed as major and central ingredients. As also mentioned above, Zhou's product contains, as its main components, naturally occurring sugars, and terpene

Application Serial No. 10/522,322
Reply to Office Action of February 23, 2009

PATENT
Docket: CU-4060

glycosides, such as extracts from herbs, inter alia, *Stevia rebaudiana*, which are present therein and deemed as important ingredients, cannot be, notionally, "incorporated" into the invention of Kirschner, thus "filling the gap" which is left open therein. Thus, Applicant respectfully asserts that neither Kirschner nor Zhou, taken alone or in combination, render obvious the herbal combination of the rejected claims.

With respect to the rejection of Claims 53-56, Applicant respectfully asserts that Bell teaches a chewing gum comprising a gum base, a flavoring component, and optionally a sweetening component, wherein the flavoring component consists of one or more flavorants absorbed releasably on finely divided silica, and wherein the sweetening component optionally comprises one or more sweeteners absorbed releasably on finely divided silica ("Brief Summary of the Invention", Col. 2, emphasis added).

The flavorants contained in Bell's product include both natural and artificial flavors and mints as well as various fruit flavors, and its sweeteners include, among many others, "*Stevia rebaudiana* (Stevioside)". Bell's flavorants include just one of the four herbs of the herbal composition of the invention, viz. peppermint, but not the other three herbs, viz. sage, yarrow and thyme, and it is important to note that Bell is labeling the *Stevia rebaudiana* component which may be present as sweetener as "Stevioside", which any person skilled in the art considers as highly pure synthetic sweetener, as opposed to the extract of *Stevia rebaudiana* which is a major and central ingredient of the herbal communication of the invention.

Thus, Applicant respectfully asserts that neither Kirschner nor Zhou nor Bell, taken alone or in combination, render obvious the herbal combination of the present invention.

Finally, with respect to Claims 61-63, Applicant respectfully asserts that Oppenheimer teaches an improved confection composition containing a volatile oil, which enhances the organoleptic of said volatile oil in the oral cavity. The composition includes a volatile oil-modifying agent which ameliorates perceived undesirable organoleptic sensations, said modifying agent being preferably capsicum, most preferably capsicum in the oleoresin form, and being present in an amount of from about 1 to about ppm of the confection.

Oppenheimer's products contain flavoring components, including natural and

Application Serial No. 10/522,322
Reply to Office Action of February 23, 2009

PATENT
Docket: CU-4060

synthetic flavoring liquids such as, among others, volatile oils, with peppermint oil, thyme oil and sage oil being, *inter alia*, mentioned in rather extensive list. These products may also contain sweeteners, the list of sweeteners including, among many others, "*Stevia rebaudiana* (Stevioside)".

As in Bell, Oppenheimer also labels the *Stevia rebaudiana* component which may be present as sweetener as "Stevioside", which any person skilled in the art considers as highly pure synthetic sweetener, as opposed to the extract of *Stevia rebaudiana* which is a major and central ingredient of the herbal composition of the invention. Furthermore, Oppenheimer mentions, as flavoring components, *inter alia*, peppermint oil, thyme oil and sage oil, as opposed to the extracts of the herbs peppermint, thyme and sage, which are central ingredients of the herbal combination of the present invention.

Thus, Applicant respectfully asserts that neither Oppenheimer nor Kirschner nor Zhou, taken alone or in combination, rendering obvious the herbal combination of the present invention, nor the methods of making the same.

Applicant respectfully asserts that all of the cited prior art references are drawn to products which are fundamentally different from those of the present invention. For example, Kirschner teaches chewable prenatal nutrition supplements containing vitamin C and, optionally, folic acid, minerals, other vitamins and/or additives; Zhou teaches an herbal sweetener composition which is low in calories and ideal for use as substitute for refined sugar or sucrose; Bell teaches chewing with flavorant(s) absorbed releasably on finely divided silica; and Oppenheimer teaches a composition containing a volatile oil and a volatile oil-modifying agent.

These references mention certain herbs and/or *Stevia rebaudiana*, mostly only parenthetically, rather than naming them as major and central ingredients. Therefore, Applicant respectfully asserts that they offer no motivation or suggestion to a person skilled in the art to devise the herbal combination of the present invention. It is, thus, respectfully asserted that only having cognizance of the present invention, in an – impermissible – retrospective view and with the benefit of the invention, in an impermissible – retrospective view and with the benefit of invention, the person skilled in the art might have come to the idea that the references cited in the outstanding Office Action might be regarded as relevant. Accordingly, Applicant respectfully requests withdrawal of the present rejections under 35 U.S.C. §103(a).

Application Serial No. 10/522,322
Reply to Office Action of February 23, 2009

PATENT
Docket: CU-4060

In light of the foregoing response, all the outstanding objections and rejections are considered overcome. Applicant respectfully submits that this application should now be in condition for allowance and respectfully requests favorable consideration.

Respectfully submitted,

May 22, 2009

Date



Attorney for Applicant
Eric D. Babych
c/o Ladas & Parry LLP
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 427-1300
Reg. No. 57542